

S.B.Civil Revision Petition No.417/2005.

Rama Ben.
VS.
Lala and others.

Date : 26.2.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr. Surendra Surana, for the petitioner.

Mr. Sangeet Lodha, for the respondents.

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Heard learned counsel for the parties.

The trial court granted decree on 28.8.1998 against the petitioner. The suit was for cancellation of the sale deed executed in favour of the petitioner. The petitioner submitted application for setting aside of the ex-parte decree on 1.6.1999. According to the petitioner, she came to know about the impugned decree when he received message from Laxman on telephone at Mumbai on 23.3.1999. Since at that time, the petitioner was sick, therefore, she could not come to Sirohi from Mumbai and she could reach Sirohi on 19.5.1999 and thereafter, submitted the said application.

According to the petitioner, a registered notice

was sent to the petitioner but on that notice, a wrong address was given. It is also submitted that the notice sent by ordinary post did not return back. It is further submitted that the petitioner submitted an application for condonation of delay also supported by affidavit.

The trial court dismissed the petitioner's application for condonation of delay as well as application filed under Order 9 Rule 13 CPC vide impugned order dated 27.11.2002. Against this order, the petitioner preferred appeal which too was dismissed by the appellate court vide order dated 28.8.2004.

According to learned counsel for the petitioner, the petitioner was residing at Mumbai and no notice of the suit was served upon the petitioner. It is submitted that the petitioner submitted affidavit stating therein that the address given on registered envelope was wrong.

It appears that the trial court after hearing the arguments of the parties, merely on the basis of endorsement on the envelope of "refusal" treated the service as sufficient and, therefore, rejected the application as barred by time without considering the reasons for submitting the application delayed.

It is true that the remark of "refusal" on the registered envelope is sufficient for drawing presumption of service upon the addressee but where that fact has been controverted and that contention is supported by affidavit, then it should be enquired into the matter, may be by way of holding enquiry by affidavits also. Be it as it may be, in a matter where immovable properties are involved and setting aside of ex-parte decree may not cause prejudice, a liberal approach should be taken for condonation of delay.

In view of the above, this revision petition is allowed, the orders of the two courts below are set aside, the application filed by the petitioner for condonation of delay is allowed and the ex-parte decree dated 27.11.2002 is set aside with a cost of Rs.2,000/- which shall be payable to the plaintiff.

Both the parties are directed to appear before the trial court on 9.4.2007. The petitioner shall submit his written statement within 30 days from today.

It is pointed out by learned counsel for the respondents that the decree has already been executed and one wall has been removed but then this order of setting aside of the ex-parte decree shall not entitle the defendant to raise the wall. This Court already observed that in a matter relating to title to the immovable property, liberal approach can be taken,

therefore, this order has been passed and not in a matter where decree for injunction has been executed.

(PRAKASH TATIA), J.

S.Phophaliya